Supreme Court, U.S.
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No. 00-1456

IN THE

Supreme Court of the United States

SEAN COFFEY,

Petitioner,

v.

VICTOR R. McNAIR and TRÉ K. McNAIR,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, after a jury has found that an officer used excessive force in effecting a seizure in violation of the Fourth Amendment under the standards of *Graham v. Connor*, 490 U.S. 386 (1989), the factual findings implicit in the jury's excessive-force verdict must be accepted in assessing the "information possessed by the officer" for purposes of qualified immunity under *Anderson v. Creighton*, 483 U.S. 635 (1987).

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STATEMENT OF THE CASE

1. Respondents Victor R. McNair and Tré K. McNair[1] brought this Fourth Amendment excessive force claim against petitioner Sean Coffey, a Fitchburg, Wisconsin, police officer, in connection with a traffic stop on December 20, 1997. A jury determined that petitioner did use excessive force against both respondents and awarded each of them $5,000 in compensatory damages. The facts, presented in the light most favorable to the jury's verdict,[2] are as follows:

On December 20, 1997, respondent Victor, an African-American, was visiting his girlfriend. She lived on Rosenberry Road, a north-south residential street in a Fitchburg, Wisconsin, neighborhood in which illegal drug activity was known to have occurred. At approximately 5:30 p.m., Victor's brother, respondent Tré, came to pick him up for a church meeting. Tré parked his car on the west (southbound) side of Rosenberry Road, in front of the girlfriend's apartment building. As the respondents were getting in their car, the car that was attempting to park in front of them bumped it slightly. The other car started to pull away but then returned. The respondents got out of their car to inspect the bumper. The three occupants of the other vehicle got out and asked respondents if there was any damage.[3]

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1. The respondents are brothers. Where appropriate for clarity, they are identified herein by their first names, "Victor" and "Tré." Otherwise they are identified as "respondents."

2. While the petitioner acknowledges this requirement, his recitation of the facts is anything but in the light most favorable to the verdict.

3. Wisconsin law required, in pertinent part:

> The operator of any vehicle involved in an accident resulting in injury to or death of any person or in damage

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The respondents said no. After a few courtesies the others apologized and walked off. The respondents then got back in their car, with Victor driving, and proceeded to drive away to the church meeting.

Petitioner, on routine patrol in his squad car, observed this brief encounter while driving north up Rosenberry Road. As he passed the respondents' car, he drove very slowly, looking at them while they talked to the other group. He then pulled into a parking area a few yards away and continued watching them. There was no other activity on Rosenberry Road. He had an unobstructed view of respondents' car and could see the entire length of Rosenberry Road.

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> to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of the accident or as close thereto as possible but shall then forthwith return to and in every event shall remain at the scene of the accident until the operator has fulfilled the following requirements:
>
> > (a) The operator shall give his or her name, address and the registration number of the vehicle he or she is driving to the person struck or to the operator or occupant of or person attending any vehicle collided with; and
> >
> > (b) The operator shall, upon request and if available, exhibit his or her operator's license to the person struck or to the operator or occupant of or person attending any vehicle collided with[.]

WIS. STAT. § 346.67(1).

Petitioner had no information linking the respondents, their car, the other car or its occupants with any sort of illegal activity. Nevertheless, as the respondents drove by, he decided to check them out to see if they might have drugs in their car. He called in their license plates and found out the registration had been suspended for unpaid parking tickets. He decided to use that as a reason for stopping them.

While petitioner was obtaining the information about the unpaid parking tickets, the respondents drove onto the Beltline Highway, a limited-access freeway, on their way to the church meeting. The next exit was Todd Drive, approximately one mile ahead. Petitioner followed them. Once on the highway, petitioner pulled up behind respondents and turned on his emergency lights and siren. Victor kept driving a short distance at the speed limit. There was no good place to pull over on the highway before the Todd Drive exit, since most of it was taken up by a merging on-ramp and the rest was dark. Victor activated his right-turn signal as he approached the Todd Drive exit, slowed and exited, with petitioner right behind him. Victor drove slowly down the ramp to a well-lit Citgo service station and stopped there, waiting for instructions from petitioner.

As the respondents were slowing down to turn into the service station, petitioner radioed a "10-80," meaning backup requested for a chase in progress. He pulled into the service station behind the respondents, took up position behind his car door, drew his loaded semiautomatic pistol and aimed it at them. Over the speaker he ordered them to put their hands up, which they did. He kept them in that position while he waited for his backup to arrive. Within moments, seven other officers in seven squad cars arrived. At least four of them drew their guns on the respondents.

Petitioner then ordered Victor to exit the car, keeping his hands in the air. He then had Victor walk backward toward him while he kept his gun trained on Victor's back. Victor complied with each of his instructions. Once Victor was handcuffed, arrested and placed in a squad car, petitioner repeated the procedure with Tré, who also fully complied. Petitioner then had the respondents' car searched. Nothing was found. Tré was released after 25 minutes, Victor after an hour. Petitioner issued Victor two citations, one for the suspended registration, the other for failing to respond to an officer's signal. Both respondents were emotionally shaken by the experience, for which the jury awarded them each $5,000 in compensatory damages.

2. Respondents brought this action against petitioner under 42 U.S.C. § 1983, alleging that he used excessive force against them in violation of the Fourth Amendment during the traffic stop. Tré also claimed that he was arrested without probable cause. Both respondents also asserted related state-law claims against petitioner.

Petitioner filed a motion for summary judgment claiming he was protected by qualified immunity against all of the respondents' federal constitutional claims. The District Court for the Western District of Wisconsin denied his motion, stating, "It is disputed whether defendant Coffey had reason to believe the passengers of the McNair vehicle were involved in illegal drug activity." With respect to the excessive-force claim the district court concluded: "Factual disputes remain as to what the circumstances were that confronted defendant Coffey that night. Whether the force used was reasonable given the totality of the circumstances

will be decided by a jury." With respect to Coffey's qualified immunity claim, the district court held, in pertinent part:

> Defendant Coffey moves for judgment in his favor on the basis of qualified immunity. This motion cannot be decided as a matter of law because factual issues remain as to whether defendant's conduct was objectively reasonable according to *Graham* [*v. Connor*, 490 U.S. 386 (1989)].

The case proceeded to trial before a jury. The district court instructed the jury that it was to evaluate the plaintiffs' claims under a standard of objective reasonableness determined from all the facts and circumstances, including the factors listed in *Graham*, and that reasonableness "must be judged by the perspective of a reasonable police officer on the scene rather than with the 20/20 vision of hindsight." It also instructed the jury to "allow for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving[.]"

The jury returned its verdict in the respondents' favor on the excessive force claims, answering "yes" to each of the following questions:

> Did defendant Sean Coffey use excessive force during the course of the December 20, 1997 traffic stop of plaintiff Victor McNair which deprived him of his Fourth Amendment right to be free from unreasonable seizure?
>
> Did defendant Sean Coffey use excessive force during the course of the December 20, 1997 traffic

> stop of plaintiff Tré McNair which deprived him of his Fourth Amendment right to be free from unreasonable seizure?

The jury found in petitioner's favor on Tré's arrest claim and on the state-law claims. It subsequently awarded each respondent $5,000 in compensatory damages on the excessive-force claims.

3. Petitioner then moved for judgment as a matter of law under FED. R. CIV. P. 59(e) solely on the ground that he was "protected from liability by qualified immunity." He did not attack the jury's verdict that he had used excessive force against the respondents in violation of their Fourth Amendment rights. The district court granted the motion and dismissed the case on the basis of qualified immunity. The court said it "defer[red] to the jury on [its] factual determination" that petitioner's conduct "was not objectively reasonable." Pet. App. 11a. However, in examining the circumstances facing petitioner for purposes of qualified immunity, the court said petitioner "chose to implement a high risk vehicle contact procedure when he suspected the plaintiffs of illegal activity and they failed to stop when he attempted to halt their vehicle." Pet. App. 12a. It concluded that a reasonable police officer could have believed that petitioner acted lawfully based on existing law. The district court referred specifically to a Wisconsin Supreme Court decision[4] that approved the use of a high-risk stop with guns drawn when, as the district court noted, it was "performed based on reasonable suspicion of drug activity."[5] Pet. App. 13a.

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4. *State v. Richardson*, 156 Wis. 2d 128, 456 N.W.2d 830 (1990).

5. *See id.* at 136-42. The district court also cited the decision of another district court, *Cuautle v. Tone*, 851 F. Supp. 1236 (Cont'd)

4. The Court of Appeals for the Seventh Circuit reversed and remanded for entry of judgment on the jury's verdict. Pet. App. 8a. It concluded that the qualified immunity issue was governed by its prior decision in *Frazell v. Flanigan*, 102 F.3d 877 (7th Cir. 1996).[6] Noting that, for purposes of

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(C.D. Ill. 1994) as a case approving felony stop procedures. Pet. App. 13a. In *Cuautle*, however, the court denied the officer's summary judgment petition with regard to the use of the felony stop procedure, determining that its reasonableness depended on the reasonableness of his belief that plaintiff was driving a car with stolen license plates, potentially a felony. *Id.* at 1240-41.

6. In *Frazell*, the jury, after hearing conflicting versions of the facts, found that the officer had used excessive force. On appeal the officer challenged both the excessive-force verdict and the district court's refusal to grant him qualified immunity. After upholding the verdict, the court of appeals observed with respect to the qualified immunity issue, "The instant case is somewhat unique . . . in that a jury has already determined that the force applied by Trooper Flanigan was objectively unreasonable under the circumstances. At the very least, we are bound by the jury's resolution of disputed factual issues in assessing Flanigan's immunity defense." *Id.*, 102 F.3d at 886. It then concluded:

> In the circumstances of this case, we agree that the jury's excessive force verdict effectively forecloses Flanigan's immunity defense. Bearing in mind that it was clearly established in 1986 that a police officer would violate the Fourth Amendment by employing excessive force during an arrest, Flanigan would not be entitled to immunity unless he could convince us that it was objectively reasonable at the time for him to believe that his conduct was lawful. After resolving the many disputed factual issues in this case, however, the jury

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immunity, the legal standard, in this case the standard of *Graham v. Connor*, "must be specific in its relation to the facts," the court stated, "*Frazell* holds that 'once a jury has determined under the Fourth Amendment that the officer's conduct was objectively unreasonable, that conclusion necessarily resolves for immunity purposes whether a reasonable officer could have believed that his conduct was lawful.' " Pet. App. 4a-5a. It went on to recognize that "qualified immunity is [not] inconceivable in an excessive-force case" and would be appropriate if, in a particular case, "the circumstances would not have alerted a reasonable officer that his acts could be deemed an application of excessive force." Pet. App. 5a.

REASONS FOR DENYING THE WRIT

1. The issue in this case is not the fundamental interplay between Fourth Amendment excessive-force claims and qualified immunity.[7] The issue is simply, what are the facts, as the jury found them, on which the petitioner's qualified immunity defense depends?

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> found that a reasonable police officer in Flanigan's position would not have believed that the force employed by Flanigan and the other officers was justified under the circumstances. That conclusion means that, as a legal matter, Flanigan's immunity defense must fail.

Id. at 877 (citations omitted).

7. The "Question Presented" as stated in petitioner's Petition is copied verbatim from the petition in *Saucier v. Katz*, No. 99-1977.

This case and the decision of the court of appeals below turn on the unremarkable proposition that, where both the excessive-force claim and qualified immunity depend on the same disputed facts, the jury's factual findings must be accepted as to both issues. This includes both its express findings and those that are implicit in its verdict.

On that question, there is no dispute among the circuits. It is, of course, inherent in the decisions of those circuits that merge the two analyses into one. *See, e.g., Bass v. Robinson*, 167 F.3d 1041 (6th Cir. 1999);[8] *Acosta v. City of San Francisco*, 83 F.3d 1143 (9th Cir. 1996).[9] It is recognized equally by those circuits that treat qualified-immunity analysis separately from substantive excessive-force analysis.

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8. "[A] question of fact exists as to whether Defendants used excessive force and thus violated rights that were clearly established at the time." *Bass* at 1051.

9. [R]egardless of whether it is the judge or the jury who makes the ultimate determination on the issue of qualified immunity, that decisionmaker must rely on the jury's factual findings as to the disputed issues of fact. . . . Regardless of who makes the ultimate determination as to qualified immunity, *the jury, not the judge, must decide the disputed "foundational" or "historical" facts that underlie the determination.*

Acosta at 1147 (emphasis added). *Note:* in *Katz v. United States*, 194 F.3d 962, __ (9th Cir. 1999), *cert. granted sub nom. Saucier v. Katz*, 531 U.S. __, 121 S. Ct. 480 (2000), the Ninth Circuit concluded that a disputed issue of excessive force necessarily precludes summary judgment on qualified immunity. *Katz* at 968-69. However, in *Acosta*, the same court engaged in a separate analysis of qualified immunity after affirming the jury's excessive-force verdict.

See, e.g., Priester v. City of Riviera Beach, 209 F.3d 919 (11th Cir. 2000);[10] *Thomas v. Roach*, 165 F.3d 137 (2d Cir. 1999);[11] *Karnes v. Strutski*, 62 F.3d 485 (3d Cir. 1995);[12] *Rowland v. Perry*, 41 F.3d 167 (4th Cir. 1994);[13] *cf. Snyder v. Trepagnier*, 142 F.3d 791 (5th Cir. 1998), *cert. granted*, 525 U.S. 1096, *cert. dismissed*, 526 U.S. 1083 (1999).[14]

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10. "*When we defer to the jury's implicit fact finding*, the excessive force in this case was obvious and was such that every reasonable officer would have known that it was clearly in violation of Priester's constitutional rights." *Priester* at 927 (emphasis added).

11. "Summary judgment on qualified immunity grounds is not appropriate where there are facts in dispute that are material to a determination of reasonableness." *Thomas* at 143.

12. So long as a "reasonable jury could find that the unlawfulness of [the troopers'] actions was so 'apparent' that no reasonable [police officers] could have believed [their] actions were lawful," district court should submit disputed material facts to jury on issue of qualified immunity. *Karnes* at 494 (internal quotes and citations omitted).

13. "Combined with . . . unfavorable *Graham* factors, we believe that a jury could find no reasonable officer could have believed his conduct to be lawful in light of the circumstances known to him at the time." *Rowland* at 174.

14. The jury's answer that Trepagnier used excessive force *apparently was based on its conclusion* [emphasis added] that Snyder did not actually have a gun. The jury's additional answer that "Trepagnier had a reasonable belief that his actions would not violate [Snyder's] constitutional rights" *must have been based on a*

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Graham v. Connor, 490 U.S. 386 (1989), of course, counsels that an excessive-force claim must be analyzed by an "objective reasonableness" standard "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.*, 490 U.S. at 396, 397. Implicit in the jury's excessive-force verdict is a finding that no reasonable officer in petitioner's position on December 20, 1997 would have seen the conversation on Rosenberry Road as anything other than what it really was: a brief verification of no damage following a minor, even negligible, traffic mishap, which Wisconsin law required.[15] Equally implicit was a finding that no reasonable officer, possessing the same objective information that petitioner had, would have believed respondents were in any way involved in illegal drug activity. As all of the circuits that have addressed the issue have concluded, those factual findings are as binding on the question of qualified immunity as on the substantive excessive-force claim.

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> *finding* [emphasis added] that Trepagnier *reasonably believed* [court's emphasis] Snyder had a gun[.]

Snyder at 801. The Fifth Circuit apparently construed the element of reasonable mistake to apply only to qualified immunity and not to the excessive-force question. This reads the discretionary element of *Graham v. Connor*, 490 U.S. 386 (1989) too narrowly. *Graham* requires that excessive force be determined "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," and explicitly allows for reasonable mistake. *Id.* at 396-97.

15. *See* WIS. STAT. § 346.67(1).

The district court disregarded this basic principle. It substituted its own view of the facts for the jury's in finding qualified immunity, implicitly accepting as reasonable petitioner's contention that he suspected the respondents of illegal drug activity. Pet. App. 12a, 13a. The Petition for Certiorari itself perpetuates this fallacy. In his Statement of the Case, petitioner insists that he "thought that three individuals (rather than just the two respondents) had left in the car" and that he "suspected that the occupants of the car were drug dealers." Pet. 3. In his Reasons for Granting the Writ, he states, "Like petitioner, the officers in *[State v.] Richardson* suspected that Richardson's motive was to traffic illegal drugs." Pet. 9. He also claims he was confronted with "the apparent connection between the plaintiffs and a drug house, the dangers inherent in dealing with suspected drug-traffickers . . . and a third occupant's [who never existed] apparently concealing himself in the plaintiff's car." Pet. 11-12.

If the jury had found petitioner's belief that illegal drug activity was involved objectively reasonable, it would not have found the use of the high-risk stop procedures excessive. Petitioner continues to say that is what he believed, but he has never contested the jury's excessive-force verdict. Accepting the facts as the jury found them, a reasonable officer would have understood that he was confronted with nothing more than what the court of appeals described: someone potentially guilty of "the offense of not paying parking tickets" who "stopped about a mile from the place where [petitioner] turned on the patrol car's flashing lights." Pet. App. 2a.

2. The court of appeals' decision to hold petitioner to the facts as found by the jury, in evaluating his qualified immunity claim, does not depart from any decision of this Court. To the contrary this Court's seminal decision on the applicability of qualified immunity to Fourth Amendment claims, *Malley v. Briggs*, 475 U.S. 335 (1986), endorsed the submission of disputed factual issues bearing on qualified immunity's "objective reasonableness" inquiry to a jury, by remanding the case for trial on the qualified immunity issue. *Id.* at 345 n. 8 ("The question is not presented to us, nor do we decide, whether petitioner's conduct in this case was *in fact* objectively reasonable. That issue must be resolved on remand." (Emphasis added)).[16]

Nothing in *Anderson v. Creighton*, 483 U.S. 635 (1987) dilutes the requirement that facts material to the qualified-immunity defense be determined by the jury. *Anderson* commands that the right an officer is alleged to have violated be "clearly established" in the sense that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . In the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640. Qualified immunity protects those officers who "reasonably but mistakenly conclude" that their actions are lawful. *Id.* at 641. The "relevant question" is "whether a reasonable officer could have believed [petitioner's conduct] to be lawful, in light of clearly established law *and the information the . . . officer[] possessed.*" *Id.* (emphasis added).

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16. In *Malley*, the case had been tried to a jury, but the district court granted a directed verdict on qualified immunity. The First Circuit reversed, requiring a factual determination of "objective reasonableness." This Court affirmed. *See id.* at 338-39.

Nor does anything in *Wilson v. Layne*, 526 U.S. 603 (1999) counsel such disregard for the jury's factual determination, simply because petitioner executed the high-risk vehicle contact in accordance with his training. In *Wilson*, the Court determined that United States marshals, who allowed media observers to accompany them while they executed a search warrant on a residence, enjoyed qualified immunity from an unreasonable search and seizure claim because there was no clearly established law forbidding such "media ride-alongs." *Id.* at 615-16. The Court approved the marshals' reliance on a Marshal's Service ride-along policy that explicitly contemplated such media accompaniment into private homes in light of the absence of any contrary case law. However, it cautioned that "[s]uch a policy, of course, could not make reasonable a belief that was contrary to a decided body of case law." *Id.* at 617.

In *Wilson* the specific procedure that had been approved by departmental policy was, for the first time, held unlawful. *Id.* at 618. In the present case, the unlawfulness stems, as the jury found, from petitioner's factually unreasonable decision to deploy the high-risk procedure in the first place.

The "information the officer possessed" is a factual question. *See Anderson*, 483 U.S. at 641. If the officer is factually mistaken, the objective reasonableness of his mistake depends on the information he possesses. If there is a factual dispute about that information and the dispute is material to the reasonableness question, it must be resolved by a jury. This is true of substantive Fourth Amendment analysis, which also allows for reasonable mistakes. *See, e.g.*, *Graham*, 490 U.S. at 396-97; *Maryland v. Garrison*, 480 U.S. 79, 86-87 (1987); *Hill v. California*, 401 U.S. 797, 802-04 (1971). It is equally true of qualified-immunity analysis. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995); *Malley*, 475 U.S. at 345 n.8.

Any lingering doubt on this point was laid to rest in *Johnson v. Jones*. Qualified immunity, of course, is intended to protect an official not only from liability, but from suit as well. Where appropriate, immunity questions should be resolved "at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227 (1991). To this end, a denial of summary judgment on qualified immunity grounds is immediately appealable if it turns on a "purely legal" issue: "whether the facts alleged . . . support a claim of violation of clearly established law" without regard to "the correctness of plaintiff's version of the facts." *Mitchell v. Forsyth*, 472 U.S. 511, 528 & n.9 (1985). However, in *Johnson*, the Court held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." *Johnson*, 515 U.S. at 319-20.

3. The mere fact that the jury made its factual findings in connection with the excessive-force claim in no way diminishes the validity or force of those findings as to the qualified-immunity claim. Facts are facts. They do not change simply because they are material to two separate legal analyses. The field of facts relevant to particular legal issues may differ, but the specific facts are not so malleable. "[R]egardless of whether it is the judge or the jury who makes the ultimate determination on the issue of qualified immunity, that decisionmaker must rely on the jury's factual findings as to the disputed issues of fact." *Acosta*, 83 F.3d at 1147.

Graham's "objective reasonableness" standard "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight," was clearly established

law on December 20, 1997, when petitioner used the high-risk vehicle contact procedures against the respondents. It commanded a trier of fact to give "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

Petitioner was well aware of the *Graham* requirement when he stopped the respondents. He understood, as he states in his Petition, that he had to engage in a "threat assessment" to determine the appropriate level of force to use. He acknowledges that, in order for him to use the high-risk procedure, the circumstances had to raise concerns for his safety. Pet. 4, 12. Those concerns, however, had to be "objectively reasonable" for purposes of the Fourth Amendment claim and "objectively legally reasonable" for purposes of qualified immunity. *Graham*, at 397; *Anderson*, 483 U.S. at 644.

The jury's factual findings about how a reasonable officer would have perceived the facts that confronted petitioner apply equally to both questions. As a practical matter, in this case they also dispose of both.

Petitioner asks this Court to disregard the jury's findings altogether and assume a wholly different set of facts, based on his perception that the respondents were drug dealers, *even though he did not challenge the jury's verdict.* There is no warrant in this Court's precedents for such a selective approach to a jury's unchallenged findings. At no time has petitioner contended that, on December 20, 1997, a reasonable officer could have believed that the use of a high-

risk vehicle contact to stop someone suspected only of driving with plates suspended for unpaid parking tickets, was lawful. This is not surprising. The excessiveness of a high-risk stop in that situation is obvious, even if it is carried out "by the book."

Instead, petitioner has repeatedly grounded his argument for qualified immunity *solely* on his claimed suspicion that the respondents were drug dealers, a suspicion the jury found unreasonable. The district court correctly observed, in its decision denying summary judgment, that the jury had to decide "whether [petitioner] had reason to believe the [respondents] were involved in illegal drug activity." The jury determined he did not. Having accepted the jury's verdict on the facts, petitioner has no basis for asking this Court to disregard it.

CONCLUSION

This case simply involves the proper application of the factual findings implicit in the jury's verdict. It raises no significant issue of qualified immunity that warrants this Court's review. The petition for certiorari should be denied.

Respectfully submitted,

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